90-1891

Supreme Court, U.S.
FILED
FEB 27 1991
OFFICE OF THE CLERK

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT D. HEJL Petitioner,

v.

CITY OF AUSTIN, AUSTIN-TRAVIS COUNTY HEALTH DEPARTMENT, and TRAVIS COUNTY, TEXAS
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Robert D. Hejl respectfully prays that a writ of certiorari issue to review the opinions of the United States Court of Appeals for the Fifth Circuit, entered on October 30, 1990. Rehearing denied November 29, 1990.

OPINION BELOW

The opinion and order of the United States Court of Appeals for the Fifth Circuit is not reported. A copy of opinion is in appendix at B.

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FEBRUARY 27, 1991

COUNSEL TO REPRESENT IF WRIT GRANTED.

QUESTIONS PRESENTED

I. Did the Court of Appeals For the Fifth Circuit err when Res Judicata of "parallel action" was applied to this second, separate conspiracy, affirming dismissal when facts and evidence clearly indicate a cognizant cause?

   1. Under Constitutional Amendment XIV Due Process, Notice and Hearing
   2. Under 42 USC 1985 (3) Conspiracy
   3. Under 42 USC 2000 a (a) (b) (c) (d), Sec. I, Sec. 2. Entitlement

II. Did the Court of Appeals For the Fifth Circuit err when the dismissal of Petitioner's cause by lower court was affirmed under the claim of selective enforcement, a violation of Petitioner's Constitutional Amendment XIV equal protection rights? (Combined in argument 1. due to same subject matter).

III. Did the Court of Appeals for the Fifth Circuit err when in opinion, no opinion was rendered on Municipal Liability?

LIST OF PARTIES

The parties to the proceedings below in the United States Court of Appeals for the Fifth Circuit were Petitioner Robert D. Heil and Respondents City of Austin, Austin-Travis County Health Department, and Travis County, Texas.

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JURISDICTION

Jurisdiction on Writ of Certiorari is sought under Rule 10.1.(a).

in conflict with the decision

(a) When a Court of Appeals has rendered a decision of another Court of Appeals on the same matter, and the lower Court has so far departed from the accepted and usual course of judiciary proceeding, calling for the exercise of this Court's power of supervision. Namely, failure to recognize Petitioner's due process, equal protection rights of NOTICE and HEARING under Constitutional Amendment XIV, clearly and unmistakably stated in Petitioner's Third Amended Complaint, and evidenced in Record, as well as other Constitutional and Statutory rights which were violated. The Court of Appeals for the Fifth Circuit affirmed the dismissal of the Lower Court on October 30, 1990 and denied Re-hearing on November 29, 1990. Appeal was timely filed. The lower District Court dismissed Cause NO. A-88-CA-536 on June 14, 1989.

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STATEMENT OF THE CASE

PREFACE

The Events leading to suspension of Petitioner's right to engage in commerce are critical to any judicial determination and are therefore related in Appendix so that events will not be confused with statement of this complaint. Appendix.H

On same day Petitioner Hejl reported second segregation to State Attorney general, official of Resp. A-TCHD Fred Rodgers served suspension notice [17] on Hejl by US Mail, certified, acting under "hazardous" clause of Ordinance 6-5-2 [7] promulgated by Resp. City of Austin (COA) City Council under authority derived by State Statute and City Charter[7]. Suspension was enacted by agent of Resp. A-TCHD who acted in official capacity under authority of State law which clothed him with this authority, and suspension was done under Authority of City of Austin Ordinance 6-5-2, Rules On Food Service Sanitation - State law, and Rules of Travis County For Private Sewage Facilities, made under color of State law. NO Hazard existed. Hejl was in full compliance with State Rules[6] and Statutes[5]. Hejl was intentionally, deliberately, and maliciously singled out as "non-Member"

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[17] Suspension Letter; App. F-17 : [7] COA Ord. 6-5-2 ; Charter App. F-7 : [6] Tx. F.D.&C Act; Rules App. F-6: [5] Food Lic. Req. App. F-4.

(of CTGA) at Market in a Second conspiracy to remove Hejl from Market by suspension of Hejl's right to engage in commerce, selling mfg. food products. Suspension COULD NOT be any rational protection of health, safety, or public welfare; its purpose was to chill dissent, punish, intimidate, and financially injure Hejl.

The suspension letter [17] did not contain Written Notice of availability of hearing as mandated in Resp. COA Ordinance # 810219D (6-5-2)[7] Sec. 6-5-33 Suspension (b) [18].

When Hejl called suspending official Fred Rodgers (as suspension letter [17] directs), prior to expiration of 10 days, Rodgers angrily stated that Hejl would have to SUE to regain right to engage in commerce, denying any hearing, denying Hejl's right to due process of notice and hearing, and equal protection right of Const. Amend. XIV. Hejl then called his Travis County Pct. 3 Commissioner's office and was again told that he would have to sue to regain right to engage in commerce.

Repeated petitions for reinstatement without necessity of suit, directed to All highest officials of Resp. COA and Resp. Travis Co. were denied. Officials of all Resp. had full knowledge that an unlawful suspension had occurred without due process of notice and hearing. (Suspension[17] was notice). Resp. A-TCHD continued demand for suit until suit

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[17] Susp. Ltr.; App. F-17; [7] COA Ord. 6-5-2; Charter; App. F-7; [18] Susp. Procedure; App. F-18

was filed. Hejl sued. Suspension continues. CTGA "members" continue to sell mfr. food products at CTGA Market(s) in non-compliance with State licensing, or compliance with inspected commissary (necessary for license), and other vendors of food products are exempted at whims and discretion of Respondents.

Federal District Court jurisdiction was under 42 USC 1983, 42 USC 1985 (2) (3), 42 USC 2000a (a) (b) (c) (d), 42 USC 2000a-1, 42 USC 2000a-2 (a) (b) (c). The United States District Court for the Western District of Texas dismissed cause on the 12th day of October, 1989 under Rule 12 (b) (6). Petitioner appealed to Court of Appeals for the Fifth Circuit and Dismissal of Lower District Court was affirmed on October 29, 1990, a judgment from which Petitioner submits application for writ certiorari.

REASONS FOR GRANTING THE WRIT REQUESTED

1. Importance of the case

This raises questions that affect the lives and professions of all citizens. Selective enforcement is a silent, sinister, invidious form of enforcement regularly used by agents, officials, and officers of local governments to intimidate, punish, and retaliate against those who oppose political factions, express opposing views by dissent, expose corruption, or simply demand those rights due an American citizen under Constitution, Statutes, and Laws.

When a conspiratorial nexus includes local, County, and State agents/officials of government, only Federal intervention can protect the rights of an individual. 42 USC 1983 clearly states "any citizen" of the United States, not any "class." Dismissal of Petitioner's (hereinafter HEJL) cause when facts clearly indicate a cognizant cause under DUE PROCESS - Denial of notice and hearing - with undeniable evidence in Record to substantiate Hejl's complaint, places before this Supreme Court the immediate need to address several questions, in particular, selective enforcement and a due process mandate to prohibit this act.

What are minimum mandated requirements of notice and hearing which will guarantee that no citizen will be deprived of his lawful right to engage in commerce and prohibit denial of this right by selective enforcement?

Does every American citizen have equal protection, rights, privileges, and immunities under the law, or is protection

limited to Race, Color, Religion, or National Origin? Should Statutes be amended to include "invidious reasons"?

Is a Caucasian, White, Protestant, American Citizen entitled to be free of discrimination (or segregation) in a place of public accommodations, and in particular, when such discrimination (or segregation) is deliberate or supported by State Action? Or is "class" membership or "classification" necessary? Hejl's unlawful classification as "non-member" (of CTGA) by State TDA was not recognized by Court(s).

Do Federal Constitution, Amendments, and Statutes protect a citizen from retaliation by agents of government when the citizen speaks out in protest of unconstitutional Rules and exposes unlawful acts of officials and employees, or must this citizen belong to a "class" to obtain Federal protection?

This cause began when a citizen exposed fraud and the illegitimate promulgation of discriminating, unconstitutional Rules - so discriminating that records have been destroyed and not entered in Public Records as required by State Law.[21] Fraudulent information was respondent A-TCHD's justification for suspension.

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[21] Duties Clerk; App. F21.

I

Did the Court of Appeals for the Fifth Circuit err when Res Judicata of parallel action was used in this cause? This was a second, known conspiracy and formed basis for severance of causes.

ANALOGY: Conspirators conspire to murder subject; are apprehended. Escape punishment at trial by technicalities of arrest. Second, different group of individuals conspire and attempt to murder same man, are fortunately apprehended.

Are second conspirators exempt from prosecution by reason of Res Judicata of first conspiracy?

Under application of previous opinions in parallel action, Appellant's Argument I 1c 42 USC 1985 (3) CONSPIRACY 42 USC 1985 (3), and Constitutional Amendment XIV claim of denial of equal protection and due process by denial of notice and hearing - clearly stated in Third Amended Complaint - Argument I 1a, were not considered under cognizance, nor was discrimination in a place of public accommodations, which was included in Appeal as discretionary determination II. No mention was made in opinion concerning Appellant's I 1.d Municipal Liability by the Court of Appeals for Fifth Circuit.

1. Respondent (Resp.) COA City Ordinance # 810219-D City Code Chapter 6-5 Art. I, II, and VI[7] promulgated by Resp. COA City Council under authority of COA Charter[7] and State Statute[7] is adopted by Resp. Travis County under authority of

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[7] COA Ord. 6-5-2; Charter; App. F7.

State Statutes; enforcement is by Resp. Austin - Travis County Health Department (A-TCHD), a Department under joint City-County function of health services by consolidation permitted by State Statute.Suspension[7,18] R 0102 mandates WRITTEN notice of availability of hearing in suspension letter, Hejl's suspension by certified letter P 065 667 154 [17] R 0128, R 0129 was a violation of Hejl's equal protection rights under Const. Amend. XIV. The letter DOES NOT contain any notice of availability of hearing. When Hejl called suspending officer Fred Rodgers (Official of Resp. A-TCHD) to determine why he had suspended Hejl while Hejl was in compliance, Rodgers angrily informed Hejl that he would have to sue to regain right to engage in commerce (anywhere). Agent was called Prior to expiration of 10 days. Hejl then called his Pct. 3 County Commissioner's Office and agent repeated that Hejl would have to sue. No hazard existed. A fraudulent complaint had issued, based on fabricated information R 0164 (4) unknown to Hejl.[15] R 0168, R 0254. There was no water problem, and no sewage problem existed. Hejl was singled out for selective enforcement by suspension solely because he refused to join CTGA and was therefore a "non-member", not entitled to the unlawful exemption granted CTGA by Resp. agents. Suspension was without probable cause or any justification.

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[7] COA Ord. 6-5-2; Charter: App. F7: [18]Susp. Procedure; App. F18: [17]Susp. Ltr.; App. F17: [15] Resp. Exh. "A"; App. F15:

Hejl has no opportunity to meet any demands. There is no post-suspension procedure for hearing under local and State Law; suit is only alternative unless suspending official rescinds suspension.

"Plaintiff had a clearly established right to a hearing." Andreau v Sapp CA 11 No. 89-3054 Dec. 18, 1990 Thos. A. Clark Circuit Judge (1990 WL 187060 Vol 14 No. 1 West's Fed. Case News) "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." Carey v Piphus 435 US 247, 259 (1978). Resp. City Code 6-5-2 is deficient and defective in procedure of enforcement because it gives health officers unbridled authority under authority invested by State Law; authority that is unlimited in scope of authority and discretion without any limiting restraint to prevent selective enforcement. Under Sec. 6-5-33[18](a) R 0102: "The health officer may, without warning, notice, or hearing suspend any permit issued under this chapter" "1" if the holder of the permit does not comply with the requirements of this chapter. QUESTION: Is a minor infraction grounds for suspension? Does "may" impart ability, liberty, permission, possibility, contingency, or consent of Council? "2" "or if the food establishment or operation otherwise constitutes a substantial hazard to public health".

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[18]Susp. Procedure; App. F18

Under this part of clause, the establishment can be determined to be in compliance with Rules, and still be suspended.

The Resp. COA Council has clearly granted powers of discretion and authority to a health official that are so broad and undefined that they constitute denial of due process rights and openly include possibility and probability of abuse and retaliation at whims of suspending official or officials of government, to create a chilling effect upon those suspended. There is not criteria in this Ordinance Suspension Procedure as to "compliance with the requirements of this chapter". Any infraction could be a determining factor. Under DEFINITIONS[7] "APPROVED" means acceptable to the health officer based on his determination as to conformance with the appropriate standards and good public health practice." (A grade of 60 on inspection is passing)

This determination is so broad and inconcise that it allowed the Travis County Pct. 3 Commissioner's Public Commissary in Manchaca to use surface discharge of greywater to water grass without permit for greywater R 0158--16-, R 0161-166, but considered Hejl's subsurface greywater use (which Resp. agent suggested) in the middle of 73 acres as "hazard" determination worthy of suspension. There are Travis County residents who have no septic system whatsoever, known to agents of Resp., a serious health

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[7]COA Ord. 6-5-2; Charter; App. F7

hazard. Is it determined "acceptable" for Resp. to dump their own sewage (by definition) wherever they please R0072,R0271-0274, to permit CTGA "members" to sell when out of compliance, or other food products vendors to do so R0158-0160, or to permit those in condition of serious public hazard[20] to continue to sell R0065-0068, "acceptable" at R0159 (J) where over 200 persons were seriously ill from incompetent inspection?

What are "appropriate standards"? They are explicitly stated in State Rules[6] and Statutes[5], and there are NO exceptions.

What constitutes "substantial hazard to public health"? Is it a licensed "non-member" (of CTGA) or 11 CTGA "members" selling beside him that are out of compliance with State Statutes and Rules, but receiving illegitimate waiver of enforcement by local, State, and political authority? Was the Captain's Club or 6M grocery a substantial hazard? Both were, but only the Captain's Club R0159 (J) was suspended, for obvious reasons. Under Sec. 6-5-33 (b) Resp. COA Council justifies the heavy-handed approach to enforcement by inserting the due process "notice" of availability of hearing within the suspension letter, giving the suspended party opportunity for hearing where suspended person or firm may hear complaint, present defense or evidence, be represented by counsel, or meet demands.

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[20]Affidavit 6M; App. F20: [6] Tx. F.D.&C. Act; Rules; App.F6: [5]Food Lic. Req.; App.F5:

Suspension of Hejl was totally deficient in procedure. First, NO hazard existed and Hejl was in full compliance with State Statutes[5] and Rules[6], had corrected the noted items on inspection long before the suspension letter issued, and was in process of following procedure required under Rules[14] of Resp. Travis County. In this letter of suspension, there is only one sentence on the second page "..... call me at 469-2016. Where is WRITTEN notice of availability of hearing? The anger of suspending official could not be concealed by his voice. R0013-0020. Hejl had no opportunity for hearing, only an adamant demand for suit to regain right to engage in commerce. It was a "determination as to conformance of appropriate standards" based upon fraudulent, R0162 (4) fabricated information[15] R0168 - and a deliberate intention to retaliate and remove Hejl from the Market.

Suspension continues, although Hejl is licensed to mfr. food products and his commissary meets State inspection. Respondents have done exactly as Informant warned Hejl. Ordinance 6-5-2 does not contain specific guarantee of due process rights, and allows unbridled authority of health officers permitted to act at their personal discretion and "determination" as to compliance. Petitioner does not believe Jureczki v City of Seabrook Texas 760 F.2d 666,670 (5th Circuit 1985) Cert. denied 475 US 1045 (1968), used as

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[5] Food Lic. Req.; App. F5: [6] Tx. F.D.&C. Act; Rules; App.F6: [14] Inn. Disp. Sys.; App.F14: [15] Resp. Exh. "A"; App. F15:

Cite by Court of Appeals for the Fifth Circuit in opinion is analogous to facts and evidence in Petitioner's cause. Hejl is in compliance, but denied any opportunity to have hearing, and complaint was fraudulent.

Unequal and selective enforcement of State Rules and Statutes, a violation of Texas Constitution and Federal Constitution, Article 1 Sec. 8 clause 3, Const. Amend. XIV. Violation of Hejl's right to Entitlement at a Place of Public accommodations renders this Ordinance 6-5-2 unconstitutional by reason of violating equal protection, equal rights, privileges, and immunities, and discrimination, under Const. Amend. XIV., and Petitioner's cause should be deemed cognizant under all claims.

2. Petitioner's Third Amended Complaint fulfills opinion of Court in Carreon v Baumann (N.D. Ill.) No. 90C 0154 Oct. 16, 1990 Nicholas J. Bua Dist. Judge 1990 WL 157304 (West's Fed. Case News Nov. 9, 1990 Vol. 13 No. 45) [Pet. makes change in ( )] " § 1983 complaint sufficiently alleged the existence of conspiracy on the part of the (suspending) officer to conceal and cover up the facts [15,17] (preface: App. G) surrounding violations of the Plaintiff's constitutional rights. The complaint alleged the requisite overt acts[17] leading to deprivation of constitutional rights. An implied agreement could be garnered from the nature of the conspiracy [2, 11, 12, 13,14,15] (Preface) R0168, R0254, a cover-up[15,17,19]

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[15]Resp. Exh."A"; App. F15: [17]Susp. Ltr.;App.F17: [2]RULES for Mkt. at Mall;App. F2: [11]CPWS RULES;App.F11: [12]Ltr. Comm.;App.F12: [13]Mall Sug.;App.F13: [14]Inn Disp. Sys.;App. F14: [19]Pet. Req. Doc., Discovery; Resp. Ans.;App.F19

R0168, R0128, R0129, R0158-0160 (R 0158 (2)/ R0161 (2) R0162 (4) which necessarily involved actions undertaken with a mutual understanding to advance a common objective[17]." The suspending official knew exactly what he was doing, and deliberately and intentionally omitted the notice and availability of hearing from the suspension letter. It was a class-based animus of CTGA "member" food products Mfrs. and a "non-member" (of CTGA) food mfr. who was also a protected class under State Statutes.[4] R0118-R0126

3. The suspension was made while Hejl was engaged in commerce at a place of public accommodations which fulfills ALL of the conditions of description of 42 USC 2000a et seq. except sales of gasoline. This complete statute was presented to the Court of Appeals as a discretionary question by Appellant. In the parallel action used in Res Judicata of the instant case, the Appeals Court for the Fifth Circuit based its determination on erroneous information derived from 1,2 (R0140, R0141) 3 and other erroneous info. Products sold were in-state, out-of-state, and foreign, with a large percentage that were not in-state grown - from Mexico! Products sold could not grow in Texas, and "Texas grown" or "local grown" was only slogan used by TDA and TAES to deceive patrons! Over half of the 60 stalls were usually

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[17]Susp. Ltr.; App.F17. [4]St. Right to Work; App.F4.

rented by dealers and [12,13] brokers. R0103, R0130 75% of produce had moved in commerce. Discrimination under this statute would be determined if under Petitioner's expression of belief and creed, a religious belief of "Old" Moravian Taborites as explained in Complaint. Suspension was intended as as a form of coercion to join CTGA; Petitioner had been warned that he had better join. "Constitution embraces not only right to worship God according to the dictates of one's conscience, but also the right to do, or forebear to do any act, for conscience sake, the doing or forebearing of which is not inimical to the peace, good order, and morals of society." Barnett v West Virginia State Bd. of Ed. DC W Va. 47 F Supp 251, 253,254 Market discriminated between CTGA "Member" and "non-member" Hejl.

III

By affirming dismissal, the Argument I 1d became moot, but is still an argument under writ certiorari, as Lower Court is alleged in error.

Petitioner's cause fulfills all criteria of City of St. Louis v Praprotnik US 108 S Ct. 915 (1988).

The constitutional deprivation of Petitioner's right to engage in commerce at a place of public accommodation (market) was done under a conspiracy to deprive Petitioner of his Civil Rights and Constitutional Rights under Const.

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[12]Ltr. Comms.;App.F12; [13]Mail Sug.;App.F13; [7]COA Ord. 6-5-2; Charter; App. F7

Amend. XIV, in particular, done by denial of due process of notice and hearing by selective enforcement without probable cause and without procedural mandate of written notice within suspension letter, with suspension being done under Resp. Austin City Code 6-5-2 Ordinance #810219-D, an ordinance promulgated by City Council of Resp. COA under authority of COA City Charter[7] which derives authority to promulgate ordinances by Texas State Statutes. Further, this suspension was done by an official of Resp. COA, Resp. Travis County, and Resp. A-TCHD who acted under authority granted by all named Resp. and did so under color of Texas State Statutes which permits enforcement of State Statutes, local ordinances and gives this officer the authority to enforce under color of law. This officer enacted suspension deliberately, intentionally, with the tacit approval, consent, and complicity of two or more conspirators whose intent was to punish, intimidate, and financially harm petitioner and remove him from Market.

Conditions of 2. are met fully. The Highest heads of Resp. respective governments COA and Travis County and their agents and officials are aware that selective enforcement takes place within their jurisdiction and that it is used to discriminate, punish, intimidate, and chill dissent; this selective enforcement is known and approved by agents, officers, and officials of respective governments of Resp., and offers unlawful exemption of compliance to health Rules and ordinance to select persons or groups of persons at whims or direction of officers, Department Heads, City Manager,

Council, or County Commissioners. There are no exceptions to State Statutes and Rules for health or food mfr.! Ordinance 6-5-2 is NOT uniformly enforced. R0065-R0068, R0072, R0271, to R0274, R0109, R0110, R0138, R0139, R0158 to R0160 with R0161 to R0166 Ans.

IRREPARABLE HARM

This cause clearly demonstrates to what extent agents of government will go to achieve their objectives and hide fraud. Petitioner dared to expose illegal activities and unconstitutional Rules, but has paid a terrible price for upholding constitutional principles. The course of justice has not protected those rights which citizens believe are inalienable rights. A fraudulent complaint justified Petitioner's suspension. Thus far, the right of due process, notice and hearing, the basic principles of American justice, has not been recognized as a right of Petitioner.

Unless strict mandates are made by this Supreme Court to prohibit the abuse of authority by vindictive agents and officials of government, with severe penalties for violation of citizens constitutional and civil rights, this invidious practice of unequal, punitive enforcement will continue and grow. Dismissals of causes like this cognizant cause will only encourage new excuses for abuse, since prosecution is difficult for anyone except the affluent. Petitioner was in full compliance with State Statutes and Rules, while 11 others similarly situated at same location were subject to suspension, but were not suspended. Case Law deserves a new outlook on Selective enforcement for Stare Decisis.

CONCLUSION

For the foregoing reasons, Petitioner would pray that this Supreme Court grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, and review the decision of the Court of Appeals for the Fifth Circuit, reversing the affirmation of Dismissal as unacceptable under evidence and facts with Record and Petitioner's Third Amended Complaint, thereby returning this cause to the Lower District Court for trial by jury.

Respectfully submitted,

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Dated: February 27, 1991